LIBRARY
SUPREME COURT, U. S.

FILED
OCT 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-645

STEVE G. MORTON and
GALE D. OSWALT,

Petitioners,

vs.

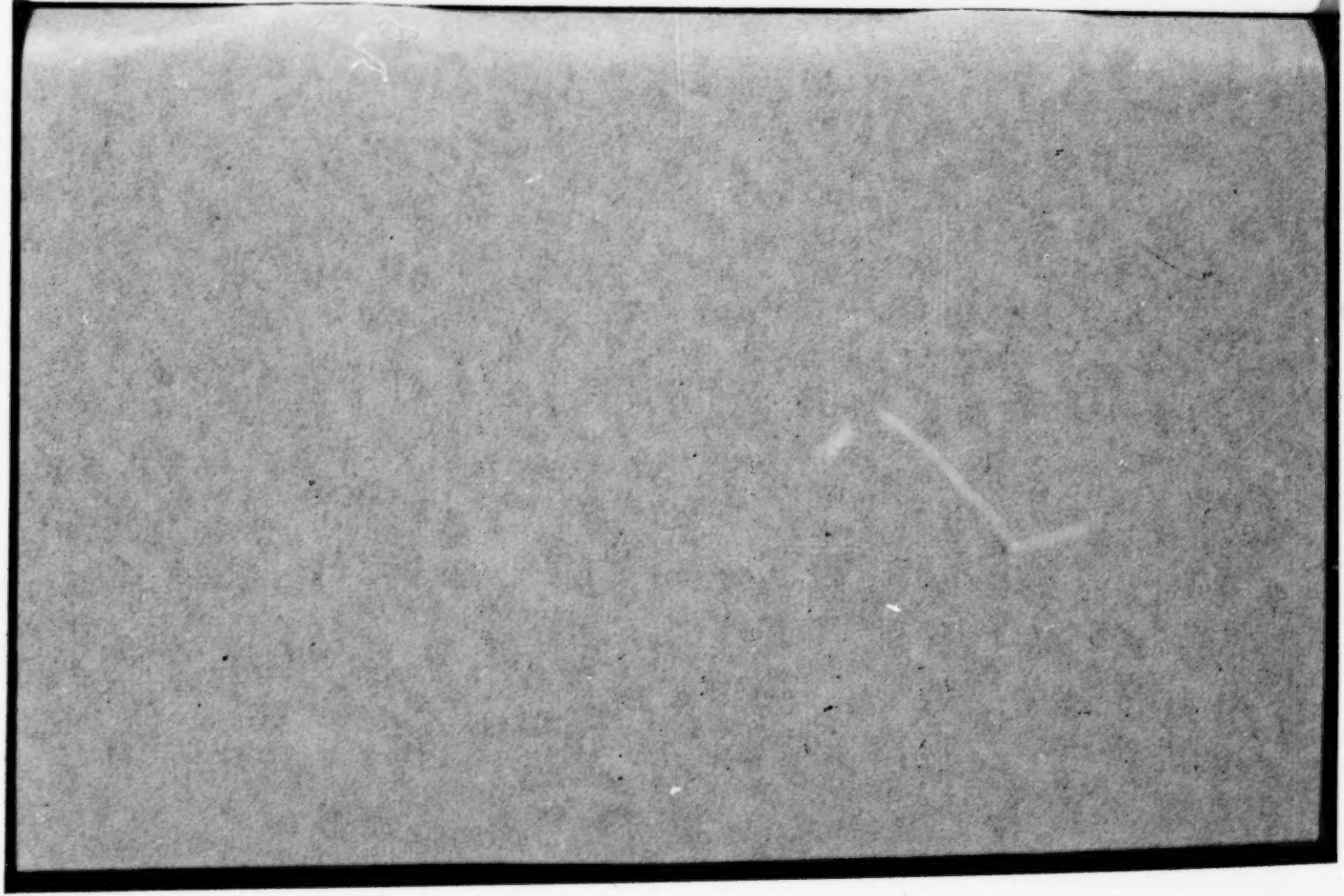
THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

C Thomas Bastien,
Attorney for the Petitioners
815 Western Federal Savings Building
Denver, Colorado 80202
Member of the Bar of the Supreme
Court of the United States

EASTWOOD PRINTING CO. • 2554 LARIMER STREET • DENVER, COLORADO



INDEX

	Page
Reference to Opinions in Courts Below	1
Jurisdiction of the Supreme Court of the United States	2
Question Presented for Review	2
Constitutional Provisions Relied On	3
Statement of the Case	3
Argument	8
Appendix A, Opinion of the Colorado Supreme Court	12
Appendix B, Order of the Jefferson County District Court	17
Appendix C, Rule 4.1, Colorado Appellate Rules	21
Appendix D, § 40-9-303, Colorado Revised Statutes 1963, 1971 Perm. Supp.	23
Appendix E, Petitioners' Motion to Suppress	24

TABLE OF CASES

	Page
Costarelli v. Massachusetts, 95 Sup.Ct. 1534 (1975)	10
Katz v. United States, 389 U.S. 347 (1967)	10
Lopez v. United States, 373 U.S. 427 (1963)	8
On Lee v. United States, 343 U.S. 747 (1952)	8
People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975)	9, 10
United States v. Chavez, 94 Sup.Ct. 1849 (1974)	11
United States v. Giordano, 94 Sup.Ct. 1820 (1974)	11
United States v. Kahn, 94 Sup.Ct. 977 (1974)	11
United States v. White, 401 U.S. 745 (1971)	3, 4, 5, 8, 9
Wiebking v. State, 19 Md.App. 226, 310 A.2d 577 (1973)	10

TABLE OF STATUTES AND RULES

18 U.S.C. § 2518 (10) (b)	11
18 U.S.C. § 3731	5, 11
28 U.S.C. § 1257 (3)	2, 10
§ 40-9-303, C.R.S. 1963, 1971 Perm. Supp.	3, 8, 23
§ 16-15-102 (1) (a), C.R.S. 1973	10
§ 16-15-102 (10), C.R.S. 1973	5
§ 18-9-303, C.R.S. 1973	4, 5, 9
§ 18-9-304, C.R.S. 1973	5
Rule 4.1, Colorado Appellate Rules	2, 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. _____

STEVE G. MORTON and
GALE D. OSWALT,

Petitioners,

vs.

THE PEOPLE OF THE
STATE OF COLORADO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado in case number 26733.

REFERENCE TO OPINIONS IN COURTS BELOW

The decision of the Colorado Supreme Court has not yet been published in the official Colorado Reports. It has been published in the National Reporter System at 539 P.2d 1255. A copy of the opinion is appended hereto as Appendix A.

The decision of the District Court, County of Jefferson, State of Colorado, in Criminal Action No. 6133, was

neither officially nor unofficially published. A copy of the Order is appended hereto as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Supreme Court of the State of Colorado was entered on August 5, 1975. This case was taken to the Colorado Supreme Court by the Respondent as an interlocutory appeal from a decision of the District Court suppressing certain evidence. The procedure is set forth in Rule 4.1, Colorado Appellate Rules. No petition for rehearing is allowed in an interlocutory appeal, pursuant to Rule 4.1 (g), Colorado Appellate Rules. A copy of Rule 4.1, Colorado Appellate Rules, is appended hereto as Appendix C.

Jurisdiction of this Court is founded on 28 U.S.C. § 1257 (3), Petitioners having asserted below and asserting here the deprivation of rights secured to them by the Constitution of the United States.

QUESTION PRESENTED FOR REVIEW

A private detective, Tromp, who was acting as a police agent, recorded certain conversations between himself and Petitioners. The conversations were recorded without prior judicial authorization and without the knowledge and consent of the Petitioners. One series of conversations was recorded by use of a suction cup device on Tromp's telephone receiver. The other series of conversations was recorded by use of a tape recorder located in Tromp's automobile. The Respondent intends to offer both the tape recordings and Tromp's testimony concerning the contents of the recordings into evidence against Petitioners at their trial.

Would the admission of such evidence violate the Petitioners' rights under the Fourth and Fourteenth

Amendments to the Constitution of the United States?

Stated in a different way, should this Court overrule the plurality opinion in *United States v. White*, 401 U.S. 745 (1971), written by Mr. Justice White, and prohibit the evidentiary use of statements of the accused recorded by police agents without prior judicial authorization and without consent of the accused?

CONSTITUTIONAL PROVISIONS RELIED ON

Petitioners rely on the Fourth Amendment's prohibition against "unreasonable searches and seizures", and the Due Process Clause of the Fourteenth Amendment, applying the Fourth Amendment to the states.

STATEMENT OF THE CASE

The Petitioners are charged as co-defendants in Criminal Action No. 6133, District Court, County of Jefferson, Colorado. In a two count information, they are charged with violating paragraph (f) of § 40-9-303, Colorado Revised Statutes 1963, 1971 Perm. Supp. The complete statutory section is appended hereto as Appendix D. The pertinent parts follow:

> *40-9-303. Wiretapping prohibited—penalty.*
> (1) Any person not a sender or intended receiver of a telephone or telegraph communication commits wiretapping if he:
>
> • • •
>
> (f) Willfully uses any apparatus to unlawfully do, or cause to be done, any act prohibited by this section, or aids, authorizes, agrees with, employes, permits, or conspires with any person to violate the provisions of this section.

Count 1 of the Information, omitting the formal parts, charged the Petitioner Morton as follows:

> [B]etween the 4th day of March, A.D., 1974, and the 7th day of March, A.D. 1974, STEVE G. MORTON, not the sender or intended receiver of a telephone communication, did unlawfully, feloniously, and wilfully aid, authorize, agree with, employ, permit and conspire with Gale D. Oswalt, to violate the provisions of C.R.S. 1963, 40-9-303, to-wit: to feloniously and intentionally overhear, read, take, copy and record a telephone communication without the consent of either the sender or receiver thereof . . .

Count 2 of the Information was identical to Count 1, except that it charged the Petitioner Oswalt "did unlawfully . . . conspire with Steve G. Morton . . ." It should be noted that since the filing of the Information the statute in question is now designated as § 18-9-303, Colorado Revised Statutes 1973.

The Information was filed on March 8, 1974, and on September 16, 1974, the Petitioners entered pleas of not guilty. Thereafter, Petitioners filed their joint Motion to Suppress. A copy of that Motion is appended hereto as Appendix E. The Motion alleged that electronic surveillance conducted by law enforcement officers was "conducted in a manner contrary to the guarantees of the Constitutions of the United States and the State of Colorado". On January 20, 1975, the Motion was granted by the District Court. The Respondent filed a Notice of Appeal to commence an interlocutory appeal under Rule 4.1, Colorado Appellate Rules (Appendix C). The Respondent then filed a Motion for Reconsideration with the District Court, relying on the decision of this Court in *United States v. White*, 401 U.S. 745 (1971). The District Court again granted the Petitioners' Motion to Suppress (Appendix B). However, the District Court's Order was not based on the constitutional grounds, but was instead

based on its interpretation of Colorado statutory law. The Respondent renewed its interlocutory appeal, and, after the submission of briefs and oral argument, the Supreme Court of Colorado reversed the ruling of the District Court on August 5, 1975 (Appendix A).

Section I of the opinion of the Colorado Supreme Court dealt very briefly with the constitutional questions, and relying on *United States v. White, supra,* held:

> Accordingly, we find no Fourth or Fourteenth Amendment rights violated by the use of the evidence electronically obtained here.

Section II of the opinion construed Colorado statutes against the Petitioners' argument. Briefly, the holding on the statutory question was that since Tromp, the secret police agent, was a party to the conversations, and consented to recording them, there was no violation of the Colorado statutes prohibiting wiretapping and eavesdropping, §§ 18-9-303 and 18-9-304, Colorado Revised Statutes 1973. Therefore, the test for suppression under § 16-15-102 (10), Colorado Revised Statutes 1973, that the communication be "unlawfully" intercepted, was not met.

The interlocutory appeal procedure in Colorado is similar to that provided in the second paragraph of 18 U.S.C. § 3731:

> 1.the District Attorney must certify that the appeal is not taken for purposes of delay;
>
> 2. the District Attorney must certify that the evidence suppressed is a substantial part of the proof; and
>
> 3. the interlocutory appeal is available only to the prosecution, not to the defense.

Following is a summary of the facts upon which the Colo-

rado Supreme Court based its decision. The summary was written by T. W. Norman, Deputy District Attorney, who represented the Respondent in the Colorado Supreme Court. Except for the omission of folio references, the summary is taken verbatim from Respondent's opening brief filed with the Colorado Supreme Court:

> Antonio Tromp, a licensed private investigator, in the State of Colorado, on March 4, 1974, received a telephone call from a person identifying himself as a Mr. Oswalt. Mr. Oswalt stated that he had a client who wanted to establish a method of telephonic interception at his place of business, Morton News Co., and at an apartment. Mr. Tromp, after some discussion, replied that the arrangement sought by Mr. Oswalt was illegal and that Mr. Tromp would not participate in this type of activity. Mr. Tromp then contacted the Jefferson County District Attorney's Office to report the March 4, 1974 conversation and was referred to the Lakewood Department of Public Safety, Intelligence Division, where he contacted Michael Igoe. Agent Igoe made an appointment to contact Mr. Tromp at Tromp's residence which is located in the City of Lakewood, County of Jefferson, State of Colorado. This appointment took place on March 6, 1974. During this appointment Mr. Tromp called Mr. Oswalt and told Oswalt that due to a serious financial reversal in his family he (Tromp) was now interested in engaging in the interception proposed by Mr. Oswalt on March 4, 1974. Certain other matters were discussed and the phone conversation was terminated after Oswalt suggested that Tromp, Oswalt and Oswalt's client meet on March 7, 1974 to discuss finances, locations of the "wiretaps" and technical details. On the morning of March 7, 1974, Tromp received another phone call at his residence in Lake-

wood from Oswalt and at approximately 11:15 a.m. Tromp again received a phone call from Oswalt suggesting a meeting between all parties for 3:30 p.m. Tromp in his private vehicle went to 17th and Curtis Street in the City and County of Denver, State of Colorado, where he picked up the Defendant Oswalt and then proceeded to the Defendant Morton's house. Morton came out of his residence and sat in Tromp's vehicle where Morton, Oswalt and Tromp engaged in conversation with regard to the wiretaps that were to be placed on certain phones. Morton also gave Tromp a $50.00 retainer for his anticipated work. Defendant Morton then left Mr. Tromp's vehicle and Tromp then drove Defendant Oswalt to 1050 Seventeenth Street.

There were electronic recordings made of the telephone conversations and the conversations in Tromp's vehicle. Tromp, recorded a portion of the March 4th call between himself and the man identifying himself as Oswalt, by use of a tape recorder and a suction cup microphone that attached to the outside of his telephone to the earpiece. Tromp also recorded the call he made to Mr. Oswalt on March 6, 1974 when Agent Igoe was present. This call was also recorded by use of the tape recorder and the suction cup microphone. Mr. Tromp also recorded the two phone calls he received from the Defendant Oswalt on March 7th by the same means. The conversations in Tromp's vehicle were recorded by Tromp by the use of a tape recorder hidden under the seat and an on-off toggle switch located to the left side of the driver's seat. This toggle switch was operated by Mr. Tromp. All the above mentioned recordings were done with the consent of and by Mr. Antonio Tromp and all were turned over to the Lakewood Department of

Public Safety for use in this proceeding. Based on the above actions the District Attorney's office applied for and received warrants for the arrest of the Defendants Steve G. Morton and Gale D. Oswalt.

ARGUMENT

The issue presented to this Court is simple; the efficacy of any argument made will not depend on the length or style of the argument. The issue is whether the time has come in the development of our society for this Court to adopt the view expressed by Mr. Justice Brennan in his opinion, concurring in the result, in *United States v. White*, at 401 U.S. 755:

> In other words, it is my view that current Fourth Amendment jurisprudence interposes a warrant requirement not only in cases of third-party electronic monitoring (the situation in *On Lee* [343 U.S. 747] and in this case) but also in cases of electronic recording by a government agent of a face-to-face conversation with a criminal suspect, which was the situation in *Lopez* [373 U.S. 427].

The facts before the Court in the present case are almost classic. Petitioner Oswalt called Tromp and was told that the activity inquired about was illegal. Thereafter, it was Tromp who initiated the alleged criminal activity by calling Oswalt back and telling Oswalt that Tromp would go ahead and perform the illegal acts. Tromp initiated the activity in cooperation with, and under the direction of, Lakewood, Colorado police agents. From the time of the second telephone call, it was all their show. The focus of the investigation had obviously homed-in on Oswalt and his "client", the Petitioner Morton. The principle of the investigation was to induce the Petitioners to violate the Colorado statute prohibiting a conspiracy to wiretap, § 40-9-303 (1) (f), C.R.S. 1963, 1971 Perm. Supp.,

now designated § 18-9-303 (1) (f), C.R.S. 1973. The tools of the investigation were Tromp and his tape recorders. Tromp's activities can only be characterized as a judicially-unauthorized exploratory search for evidence by means of electronic recording equipment.

In the plurality opinion in *United States v. White*, Mr. Justice White wrote of the desirability of "relevant and probative evidence which is also accurate and reliable." 401 U.S. at 753. It is now 1975; we are nine years from 1984, when the Orwellian spectre of a society without privacy was staged. For law enforcement purposes, a society without privacy would also be a society without perjury. It is clear that Mr. Justice White was writing of the use of electronic recording equipment as a step forward in the search for truth and the pursuit of justice. But in the months that have gone by since April, 1971, when *United States v. White* was decided, our society has had a stomachful of tape recorders, pocket transmitters and wiretaps. An ever-increasing fear pervades politics, government and business, as well as crime. The step forward has become a step into darkness.

While most states have continued to follow *United States v. White*, as did Colorado in the present case, at least one state has moved beyond *White*, under authority of its own state constitution. In *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 (1975), the Michigan Supreme Court prohibited the use of testimony from police officers who overheard a conversation by means of a radio transmitter on the person of an informer. Justice Fitzgerald, writing for the majority, stated:

> We are not prepared to rule that one's misplaced confidence in a disguised police informant who instantaneously transmits a conversation to law enforcement authorities deprives the conversation of its

private character. [227 N.W.2d at 514]

The Michigan Supreme Court specifically did not "address" the fact situation that is before this Court in the present case. 227 N.W.2d at 514, footnote 2.

Petitioners submit to this Court that they and other defendants in the type of case termed by the Maryland Court of Special Appeals as the "misplaced confidence" cases, *Wiebking v. State*, 19 Md.App. 226, 310 A.2d 577 (1973), at 310 A.2d 584, footnote 8, are entitled to the constitutional protections of the Fourth Amendment. To paraphrase *Katz v. United States*, 389 U.S. 347 (1967), what they sought to preserve as private, should not have been captured by the uninvited ear of Tromp's tape recorder. Common sense commands the conclusion that the Petitioners believed that their conversations with Tromp were completely private. It is interesting to note that the Colorado General Assembly has not designated the crime of which Petitioners are accused as one of the crimes for which a judicial wiretapping or eavesdropping order could be obtained. § 16-15-102 (1) (a), C.R.S. 1973.

Petitioners respectfully assert that the time has indeed come for this Court to make the tape recorder subject to the scrutiny of an independent member of the judiciary, before it can be turned on and destroy the security of privacy.

Petitioners are aware that the issue may be raised as to the "finality" of the judgment of the Colorado Supreme Court. 28 U.S.C. § 1257 (3). The issue brought to this Court is final in that the proffered evidence has been determined to be constitutionally unobjectionable in the "highest court of a State in which a decision could be had," 28 U.S.C. § 1257 (3), and that determination cannot be changed by the District Court. Unlike the appellant in *Costarelli v. Massachusetts*, 95 Sup.Ct. 1534 (1975), the

Petitioners in the present case have no other state forum to which they may turn for relief.

Additionally, we note that this Court has, on at least three occasions, granted certiorari to review decisions of United States Courts of Appeal in interlocutory appeals from suppression orders under 18 U.S.C. § 2518 (10) (b) and 18 U.S.C. § 3731. *United States v. Kahn*, 94 Sup.Ct. 977 (1974); *United States v. Giordano*, 94 Sup.Ct. 1820 (1974); and *United States v. Chavez*, 94 Sup.Ct. 1849 (1974).

Respectfully submitted,

C. THOMAS BASTIEN,
Attorney for the Petitioners
515 Western Federal Savings Building
Denver, Colorado 80202
303-825-0221
Member of the Bar of the Supreme Court of the United States

HARVEY P. WALLACE,
Attorney for the Petitioner Oswalt
515 Western Federal Savings Building
Denver, Colorado 80202

GENE F. REARDON,
Attorney for the Petitioner Morton
First National Bank Building
Denver, Colorado 80202

JAMES A. LITTLEPAGE,
Attorney for the Petitioner Morton
1430 Havana Street
Aurora, Colorado 80010

APPENDIX A

No. 26733

THE PEOPLE OF THE
STATE OF COLORADO,

Plaintiff-Appellant,

v.

STEVE G. MORTON and
GALE D. OSWALT,

Defendants-Appellees.

Interlocutory Appeal from the District Court
of
Jefferson County
Hon. Winston W. Wolvington, Judge

EN BANC ORDER REVERSED

Nolan L. Brown, District Attorney,
T. W. Norman, Deputy District Attorney,
Attorneys for Plaintiff-Appellant.

James A. Littlepage,
Gene F. Reardon,
Attorneys for Defendant-Appellee Morton,

Tallmadge, Tallmadge, Wallace and Hahn,
Harvey P. Wallace,
C. Thomas Bastien,
Attorneys for Defendant-Appellant Oswalt.

MR. CHIEF JUSTICE PRINGLE delivered the opinion of the Court.

This is an interlocutory appeal brought by the Jefferson County District Attorney in which the People seek relief from an order of the Jefferson County District Court, suppressing certain tape recorded communications between the defendants and a private investigator, Antonio Tromp.

On March 4, 1974, Tromp, a licensed private investigator was contacted by defendant Oswalt for the purpose of obtaining Tromp's services in establishing a method of telephonic interception for a client. Tromp declined the offer on the ground that he felt it would involve him in illegal activity. Thereafter, he contacted the Jefferson County District Attorney's office, and also met with Agent Igoe of the Lakewood Department of Public Safety, to whom he reported this conversation with Oswalt. During the meeting with Igoe, Tromp contacted Oswalt by phone and informed Oswalt that he had changed his mind, and a meeting was arranged between Tromp, Oswalt and Oswalt's client.

On the designated meeting day, Tromp, Oswalt, and Morton (Oswalt's client) carried on a conversation in Tromp's car in which they discussed wiretaps that Tromp was to place on certain telephones. Morton gave Tromp a $50 retainer for his anticipated services. The conversations in Tromp's automobile were recorded by Tromp by the use of a tape recorder hidden under the seat and operated by an on-off toggle switch located at the driver's seat. Electronic recordings had also been made by Tromp of the telephone conversations between himself and Oswalt. Tromp at all times knew of and consented to the recordings of the conversations.

The defendants were charged with conspiracy to commit the crime of illegal wiretapping. They moved to have Tromp barred from testifying as to the content of the conversations. The trial court granted the motion.

On appeal here, the People contend that there is neither a statutory nor a constitutional impediment to the use of the recorded conversations, and they should be admissible in the trial against the defendants. The defendants argue that while there may not be a federal constitutional or statutory right to have the evidence suppressed, there is such a right under Colorado statute, Section 16-15-101 (1), C.R.S. 1973 and Section 16-15-102 (10) C.R.S. 1973. We think the position taken by the People is the correct one, and we therefore reverse the order of the trial court.

I.

At the outset, we note that there is no real dispute between the parties as to whether the introduction of the recorded conversations would violate defendant's Fourth Amendment rights. Indeed, it appears that the United States Supreme Court has settled that question in *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453, where Mr. Justice White, writing for a plurality of the Court, stated:

> "Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa v. United States*, 385 U.S., at 300-303. ***For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person,*** . . . (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located else-

> where or to other agents monitoring the transmitting frequency . . . If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from the transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks." 401 U.S. at 751. (citations omitted). (emphasis added).

Accordingly, we find no Fourth or Fourteenth Amendment rights violated by the use of the evidence electronically obtained here.

II.

The defendants contend, however, that the State of Colorado, free to "impose higher standards on searches and seizures than required by the Federal Constitution . . ." *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed. 2d 730, has done so in Section 16-15-101(1), C.R.S. 1973, and Section 16-15-102(10), C.R.S. 1973. We disagree.

Article 15 of Chapter 16, C.R.S. 1973, deals with "Wiretapping and Eavesdropping," the situations in which an ex parte order may issue for that activity, and the procedure involved. Section 16-15-102(10), C.R.S. 1973, states, in relevant part:

> "(10) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the state of Colorado, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence

derived therefrom, on the grounds that: The communication was unlawfully intercepted; . . ."

The defendants contend that under Section 16-15-101(1), they are "Aggrieved Persons," and further, that that section also makes unlawful the kind of electronic recording involved in this case. However, while that section defines an aggrieved person as anyone "who was a party to any intercepted wire or oral communication," that statute is merely definitional, and proscribes nothing. The critical requirement of Section 16-15-102(10), that "the communication was unlawfully interpected," is not satisfied by the fact that the defendants may arguably be included within the definition of "Aggrieved Parties."

On the contrary, for the exclusionary application of Section 16-15-102(10) to be operative, it must not only be at the behest of an aggrieved party, but, critically, it must be shown that the communication was *unlawfully* intercepted. Moreover, in order to make that determination, one must look to the prohibitory statutes on wiretapping and eavesdropping. Since those statutes, Section 18-9-303 and 18-9-304, C.R.S. 1973, do not prohibit or make unlawful the kind of consensual situation present here, where one party to the conversation agrees to the recording, there is no "unlawful interception" within the meaning of Section 16-15-102(10). That section is, therefore, not applicable, and the evidence should not have been suppressed.

The order of the district court is reversed.

APPENDIX B

IN THE DISTRICT COURT IN AND FOR
THE COUNTY OF JEFFERSON
STATE OF COLORADO

Criminal Action No. 6133 Div. 3

THE PEOPLE OF THE STATE OF COLORADO,

vs.

STEVE G. MORTON and GALE D. OSWALT,

Defendants.

ORDER

This matter is pending on the District Attorney's Motion for Reconsideration of Defendants' Motion to Suppress. On January 20, 1975, this Court granted the Defendants' Motion to Suppress "the record or the fruits of any electronic surveillance in this case." The People started an Interlocutory Appeal but thereafter filed a Motion for Reconsideration of Defendants' Motion to Suppress. On Motion, the Supreme Court remanded the matter to this Court for the purpose of considering the People's motion.

The basic facts, without detail, are as follows: The Defendant Oswalt contacted one Tromp, a private detective, and asked him to intercept some phone calls. Tromp notified the Lakewood Police. Thereafter another phone call with Oswalt and a conference between Tromp, Oswalt and Morton were recorded by Tromp without the knowl-

edge of the defendants. No Court Order was obtained for the surreptitious recording of these conversations.

The defendants are now charged in this Court with conspiracy to commit wiretapping.

This Court originally granted the Motion to Suppress. The People then called this Court's attention to the case of *United States vs. White*, 402 U.S. 990, 91 S.Ct. 1643. In reply the defendants rely on 16-15-102, 1973 C.R.S.

The White case, *supra*, does not require a different result on the Motion to Suppress. That case merely holds that the conduct of the officers in that case did not transgress constitutional prohibitions. The Court did not rule that the legislature of Colorado or the Courts of this state could not set more stringent standards.

In enacting Section 16-15-102, 1973 C.R.S., our legislature did set more stringent standards. In that section, the legislature provided that electronic surveillance could be used only in connection with certain very serious crimes, and then only after first obtaining a court order. This case does not involve one of the crimes specified, and no court order was obtained.

The District Attorney argues that 16-15-102, 1973 C.R.S. covers only surveillance which would be a crime under Section 18-9-302 to 18-9-304. The statute should not be so narrowly construed.

Section 18-9-302 to 18-9-304 cover only a very limited number of situations involving wiretapping and eavesdropping. The wiretapping sections make it a crime to:

1. Manufacture, buy, sell or possess wiretapping or eavesdropping equipment with intent to use it illegally, (18-9-302).

2. Overhear a telephone conversation without the con-

sent of either party to the conversation (18-9-303[a]).

3. Overhear a conversation for the purpose of committing an unlawful act. 18-9-303 [b]).

4. Use or disclose the contents of any such communication, knowing it was obtained in violation of law (18-9-303[c]).

5. Tap the phone of another (18-9-303[d]).

6. Obstruct phone transmissions (18-9-303[e]).

7. Use an apparatus to violate law or aid another in so doing (18-9-303[f]).

The eavesdropping section makes it a crime to:

1. Overhear or record a conversation without the consent of one party (18-9-304[a]).

2. Overhear or record a conversation for the purpose of committing an unlawful act (18-9-304[b]).

3. Use for any purpose information received knowing it was illegally obtained (18-9-304[c]).

4. Aid anyone to eavesdrop (18-9-304[d]).

These sections limit the situations in which wiretapping or eavesdropping is a crime. For example, it is not a crime under Colorado law for one party to a conversation to record the conversation without the consent of the other party. But, these sections do not authorize the admission in evidence of conversations so recorded.

On the contrary, the next section (18-9-305[4]) provides:

> "This section shall not be construed in any manner which would allow an investigation or law enforcement officer of the State of Colorado to engage *in any wiretapping or eavesdropping* without prior authorization by a court of competent jurisdic-

tion under the provisions of Article 15 of Title 16, C.R.S., 1973." (Emphasis supplied)

It seems clear to the Court that the legislature of Colorado has expressed the public policy of this state to be that evidence received by recording of peoples' statements can only be admitted in cases involving certain very serious crimes, and then only after obtaining an order from a Court as provided in 16-15-101 to 16-15-104.

Clearly, if an officer of the law could not have recorded the conversations himself, he cannot make the evidence admissible by having a private citizen do the recording for him. While some forms of electronic surveillance, without prior judicial authorization, might be constitutionally permissible under some circumstances (see *U.S. vs. White, supra; On Lee vs. U.S.*, 343 U.S. 747, 72 S.Ct. 967). The Colorado Legislature has imposed on law enforcement officers (and on others) stringent standards of conduct which were not met in this case.

The Defendants' Motion to Suppress is granted.

Dated this 12th day of March, 1975.

BY THE COURT:

/s/ Winston W. Wolvington
Judge

APPENDIX C

Rule 4.1. Interlocutory Appeals in Criminal Cases

(a) Grounds. The State may file an interlocutory appeal in the supreme court from a ruling of a district court granting a motion made in advance of trial by the defendant for return of property and to suppress evidence or granting a motion to suppress an extra-judicial confession or admission; provided that the state certifies to the judge who granted such motion that the appeal is not taken for purposes of delay and the evidence is a substantial part of the proof of the charge pending against the defendant.

(b) Limitation on Time of Issuance. No interlocutory appeal shall be filed after ten days from the entry of the order complained of. It shall not be a condition for the filing of such interlocutory appeal that a motion for a new trial or rehearing shall have been filed and denied in the trial court.

(c) How Filed. To file an interlocutory appeal, the state, within the time fixed by this Rule, shall file the notice of appeal in duplicate with the clerk of the trial court. The notice of appeal shall immediately be forwarded by the clerk of the trial court to the clerk of the supreme court. The notice of appeal shall be in the same form, as provided in C.A.R. 3. Service on adverse parties of the notice of appeal shall be as provided in C.A.R. 3.

(d) Record. The record for an interlocutory appeal shall consist of the information or indictment, the plea of the defendant or the defendants, the motions filed by the defendant or defendants on the grounds stated in section (a) above, the reporter's transcript of all testimony taken at the hearing on said motions and such exhibits or reasonable copies, facsimiles, or photographs thereof as the

parties may designate (subject to the provisions in C.A.R. 11 (b) pertaining to exhibits of bulk), the order of court ruling on said motions together with the date, if one has been fixed, that the case is set for trial or a certificate by the clerk that the case has not been set for trial. After the filing of the record, such other exhibits or reasonable copies, facsimiles, or photographs thereof shall be transmitted by the clerk of the trial court to the appellate court as the appellate court may order. The record shall be filed within ten days of the date of filing the notice of appeal.

(e) Appearances. The state in these proceedings shall be represented by the district attorney, and briefs shall be prepared by him and responsive briefs or pleadings served upon him.

(f) *Briefs.* Within ten days after the record has been filed in the supreme court, the state shall file ten copies of a typewritten, mimeographed, or otherwise reproduced brief, and within ten days thereafter, the appellee shall file ten copies of a typewritten, mimeographed, or otherwise reproduced answer brief, and the state shall have five days after service of said answer brief to file ten copies of a typewritten, mimeographed, or otherwise reproduced reply brief.

(g) Disposition of Cause. No oral argument shall be permitted except when ordered by the court. The decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to one attorney on each side of the case. No petition for rehearing shall be permitted. Remittitur shall accompany said opinion.

(h) Time. The time limits herein may only be enlarged by order of the appropriate court before the existing time limit has expired. (Amended and effective April 1, 1971.)

APPENDIX D

40-9-303. Wiretapping prohibitd — penalty. (1) Any person not a sender or intended receiver of a telephone or telegraph communication commits wiretapping if he:

(a) Intentionally overhears, reads, takes, copies, or records a telephone or telegraph communication without the consent of either a sender or a receiver thereof, or attempts to do so; or

(b) Intentionally overhears, reads, takes, copies, or records a telephone or telegraph communication for the purpose of committing or aiding or abetting the commission of an unlawful act; or

(c) Intentionally uses for any purpose or discloses to any person the contents of any such communication, or attempts to do so, while knowing or having reason to know such information was obtained in violation of this section; or

(d) Intentionally taps or makes an connection with any telephone or telegraph line, wire, cable, or instrument belonging to another, or installs any device whether connected or not which permits the interception of messages; or

(e) Willfully prevents, obstructs, or delays, by any means whatsoever, the sending, transmission, conveyance, or delivery in this state of any message, communication, or report by or through any telegraph or telephone line, wire, cable, or other facility; or

(f) Willfully uses any apparatus to unlawfully do, or cause to be done, any act prohibited by this section, or aids, authorizes, agrees with, employs, permits, or conspires with any person to violate the provisions of this section.

(2) Wiretapping is a class 5 felony.

APPENDIX E

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF JEFFERSON
AND STATE OF COLORADO

Criminal Action No. 6133, Division 3

THE PEOPLE OF THE
STATE OF COLORADO,
Plaintiff,

vs.

STEVE G. MORTON and
GALE D. OSWALT,
Defendants.

MOTION TO SUPPRESS

COME NOW the Defendants, by and through their attorneys, and move this Honorable Court for an Order suppressing for use as evidence the record or the fruits of any electronic surveillance in this case, pursuant to Rule 41, Crim. P.

As grounds for this Motion, Defendants state to the Court:

1. There was at least one electronic surveillance conducted by law enforcement officers in this case, and there may have been more than one.

2. All such electronic surveillances were conducted in a manner contrary to the guarantees of the Constitutions

of the United States and the State of Colorado, in that:

a. No judicial officer authorized such surveillance; and

b. The consenting party was a law enforcement agent.

3. The record and the fruits of such surveillance were illegally obtained and may not be used in this prosecution.

TALLMADGE, TALLMADGE,
WALLACE & HAHN,
Harvey P Wallace
C. Thomas Bastien,
Attorneys for the Defendant
Oswalt
515 Western Federal Savings Building
Denver, Colorado 80202
825-0221, 892-5999

James A. Littlepage,
Attorney for the Defendant Morton
American National Bank Building
Denver, Colorado 80202
892-7117

Gene F. Reardon,
Attorney for the Defendant Morton
2150 First National Bank Building
Denver, Colorado 80202
255-1401

By: C. Thomas Bastien